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9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JAN ROUVEN FUECHTENER,

16 Defendant.

2:16-CR-00100-GMN-CWH

**GOVERNMENT'S MOTION FOR AN
ORDER DEEMING THE
ATTORNEY CLIENT PRIVILEGE
WAIVED
(expedited treatment requested)¹**

17 The United States, by and through the undersigned, respectfully requests that
18 this Court issue an order deeming the attorney-client privilege between Defendant
19 and Jess Marchese, Esq., Benjamin Durham, Esq., and Michael Sanft, Esq., waived
20 with regard to communications between Mr. Marchese, Mr. Durham, Mr. Sanft, and
21 the Defendant, as to any and all conversations regarding the plea agreement in this
22

23 ¹ As the Government's response to the Defendant's Motion to Withdraw Guilty Plea
24 is quickly approaching, the Government requests expedited treatment to allow a
timely response.

1 case. The attorney-client privilege does not apply to these areas because the
2 Defendant has waived the privilege by calling the conversations into question in his
3 Motion to Withdraw Guilty Plea.

4 **RELEVANT BACKGROUND**

5 On June 22, 2017, the Defendant filed a motion to withdraw his guilty plea
6 alleging that he received ineffective assistance of counsel relating to the plea
7 agreement. ECF No. 194. He alleges that the failure of his attorneys provide accurate
8 information about the consequences of his plea created a coercive environment. *Id.*
9 This motion follows.

10 **LEGAL STANDARDS**

11 When a disclosure is made in a Federal proceeding or to a Federal office or
12 agency and an individual waives the attorney-client privilege or work-product
13 protection, the waiver extends to an undisclosed communication or information in a
14 Federal or State proceeding only if:

- 15 (1) the waiver is intentional;
16 (2) the disclosed and undisclosed communications or information
17 concern the same subject matter; and
18 (3) they ought in fairness to be considered together.
19 Fed. R. Evid. 502(a).

20 The voluntary disclosure by Defendant of privileged attorney communications
21 with Mr. Marchese, Mr. Durham, and Mr. Sanft constitutes waiver of the privilege
22 as to all other such communications on the same subject. *Weil v.*
Investment/Indicators, Research & Management, 647 F.2d 18, 24 (9th Cir. 1981);

1 *Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985), cert. denied, 475
 2 U.S. 1109 (1986).

3 Even when a party does not explicitly disclose the content of an attorney-
 4 client communication, he may waive the privilege implicitly. A person
 5 cannot always claim that he relied on counsel, while protecting what
 6 was said between them from disclosure. As we have said, “The privilege
 7 which protects attorney-client communications may not be used both as
 8 a sword and a shield. Where a party raises a claim which in fairness
 9 requires disclosure of the protected communication, the privilege may
 10 be implicitly waived.” (citations omitted).

8 *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997), cert. denied, 522 U.S. 851,
 9 118 S.Ct. 141 (1997); see also *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003);
 10 *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997).

11 In this case, the Defendant has intentionally placed in issue the conversations
 12 that he had with his attorneys of record. He has challenged the effectiveness of his
 13 counsel’s representation thereby calling the content of those conversations into
 14 question. By filing his motion to withdraw his plea based on assistance of counsel,
 15 the Defendant has implicitly waived his attorney-client privilege as to the facts,
 16 circumstances, and conversations relating to the plea agreement. See, e.g., *Chevron*
 17 *Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (implicit waiver where
 18 fairness requires disclosure). This waiver extends to the timing, location, context, and
 19 content of attorney-client communications regarding the plea agreement. These are
 20 the areas that defendant, and his agent, defense counsel, have raised implicating
 21 ineffective assistance of counsel, and to which any privilege has now been waived.

22 WHEREFORE, for all the foregoing reason, the government respectfully
 23 requests that the Court enter an Order that the Defendant has waived any attorney-

1 client privilege with Jess Marchese, Esq., Benjamin Durham, Esq., and Michael
2 Sanft, Esq., with regard to communications between Mr. Marchese, Mr. Durham, Mr.
3 Sanft and the Defendant as to any and all conversations regarding the plea
4 agreement in this case.

5 **DATED** this 28th day of June, 2017.

6 Respectfully,

7 STEVEN W. MYHRE
8 Acting United States Attorney

9 //s//

10 ELHAM ROOHANI
11 Assistant United States Attorney

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the United States Attorney's Office. A
3 copy of the foregoing GOVERNMENT'S MOTION FOR AN ORDER DEEMING
4 THE ATTORNEY CLIENT PRIVILEGE WAIVED was served upon counsel of
5 record, via Electronic Case Filing (ECF), and on Jess Marchese, Esq., Benjamin
6 Durham, Esq., and Michael Sanft, Esq., via email.

7 DATED this 28th day of July, 2017.

8
9 */s/ Elham Roohani*

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11 ELHAM ROOHANI
12 Assistant United State Attorney

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

6 JAN ROUVEN FUECHTENER,

7 Defendant.

2:16-CR-00100-GMN-CWH

ORDER

8
9 Based upon the pending application of the Government, and good cause
10 appearing,

11 IT IS HEREBY ORDERED that the attorney-client privilege between the
12 Defendant and Jess Marchese, Esq., Benjamin Durham, Esq., and Michael Sanft,
13 Esq., shall be deemed waived with regard to communications between Mr.
14 Marchese, Mr. Durham, Mr. Sanft and the Defendant as to any and all
15 conversations regarding the plea agreement in the above captioned case.

16
17 DATED this _____ day of _____, 2017.

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20 _____
21 UNITED STATES DISTRICT JUDGE
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